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U.S. DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

In re:	)	
	)	
Protection of Voluntarily Submitted Data	)	Docket No. FAA- 1999-600 1-18
	)	
	)	
14 CFR Part 193	)	

Comments of the Air Transport Association of America

The Air Transport Association of America ("ATA") submits these comments in response to the Notice of proposed rulemaking published in the Federal Register on July 26, 1999 (64 Fed. Reg. 40472), regarding the circumstances under which the FAA may disclose voluntarily provided safety information to the public and other federal agencies (the "NPRM"). ATA appreciates the opportunity to provide these comments on behalf of its member airlines.[1]

I

The proposed rulemaking, while clearly intended to promote the voluntary sharing of safety or security-related information with the Federal Aviation Administration (FAA), may have, in fact, the opposite and unintended effect. Rather than providing an incentive for safety information sharing by offering protections from disclosure, the proposed rule includes such broad and arbitrary exceptions to disclosure protection that it creates a disincentive for such sharing. Further, by explicitly providing for the disclosure and use of such information in

[1] Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express Airlines, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and USAirways. Associate members are Aerovias de Mexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana de Aviacion.

enforcement actions, as well as for criminal prosecutions, it enables government agencies to use otherwise protected information -- which was, of course, *voluntarily-provided* in the first place -- *against* the individual or organization submitting the information.

This is contrary to the plain meaning of 49 U.S.C. § 40 123, which affirmatively ***prohibit?*** the FAA Administrator from disclosing voluntarily-provided safety or security data that the Administrator determines should be protected using the statutory criteria.[3] It is also inconsistent with Congress' desire, as articulated in the legislative history of this provision, to overcome private party concerns about voluntarily sharing data with the FAA. Congress recognized that the potential benefits of analyzing carrier operational data would not be realized if carriers were not willing to submit data to the FAA, and so it granted the Administrator broad authority to protect such data from disclosure in order to overcome these concerns.

Furthermore, the NPRM is plainly contrary to the FAA's *Policy on the Use for Enforcement Purposes of Information Obtained From an Air Carrier Flight Operational Quality Assurance (FOQA) Program* (the "FOQA Policy"). The FOQA Policy establishes the fundamental principle that the FAA will "refrain from using de-identified FOQA information to undertake enforcement actions except in egregious cases." See 63 Fed. Reg. 67505-06 (December 7, 1998).

The NPRM also complicates the process of designating information as protected from disclosure by creating an unnecessary notice and comment procedure. The authorizing legislation, codified at 49 U.S.C. § 40 123, does not require such a procedure either expressly or

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[2] Section 40123 reads, in pertinent part, "Notwithstanding any other provision of law, ***neither*** the Administrator of the Federal Aviation Administration, nor any agency receiving information from the Administrator, ***shall*** disclose voluntarily-provided safety or security related information . . ." (emphasis added).

[3] Under Section 40123 the Administrator must protect voluntarily submitted data if she deems such information valuable in carrying out her safety and security duties, if disclosure would inhibit receipt of such information, and if non-disclosure is consistent with her safety and security responsibilities.

implicitly. The decision to designate information as protected is left solely to the discretion of the Administrator in the exercise of her responsibilities and particular expertise. Public notice and comment will not better inform the Administrator regarding the findings required by the statute. Congress did not recognize in this statute or its legislative history a competing public interest that would be served by a notice and comment procedure, and the NPRM's reference to "a strong public policy in favor of Federal agencies releasing information to the public" (64 Fed. Reg. 40473) in this context is misplaced.

Specific comments are provided below.

II

(1) **Section 193.5. Withholding Information from Disclosure**

Subparagraph (f) appropriately allows a party who submitted information or data that may be responsive to a subpoena served on the FAA to participate in responding to that subpoena. However, this provision is inconsistent with the underlying statute and it is internally inconsistent with §§ 193.5(a) and (b). Specifically, once the Administrator has determined that information should be withheld from disclosure pursuant to the statute and §§ 193.5(a) and (b), then the FAA should take the position that it will ***not*** disclosure such information in response to a subpoena and, further, that it will take appropriate steps to prevent such information from being disclosed, such as filing a motion to quash. FAA must recognize that having started down this path, it has a vested interest in ensuring the integrity of its own determinations that information submitted voluntarily should not be disclosed. If, after receiving a subpoena, the FAA believes it can act as a disinterested third party with respect to the information at issue, then the FAA will lose credibility and the safety programs that rely on voluntarily submitted information will not succeed. Airlines submitting data must be able to rely on the FAA to actively protect that data.

(2) Section 193.7. Disclosure of Information

(a) Although it is clear from the statute that the FAA is expected to use protected data to develop appropriate "changes in policies or regulations" and to "correct a condition that may compromise safety or security," it is not at all clear that it is expected *or necessary for* the FAA to disclose protected information, even information that is "de-identified" and/or "summarized." (§§ 193.7 (a) (1) and (2)). Indeed, Congress expressly authorized the Administrator to protect qualifying data *"notwithstanding any other provision of law."* Thus, if the Administrator designates data from a program as protected, there is no statutory authority to disclose individual pieces of data submitted by an air carrier, or aggregations of such data, even in support of new policies or regulations. Generalized findings and conclusions based on aggregated data, or information summaries (see below), should be sufficient to explain the need for new policies or regulations.

(b) Further, as experts in the field readily acknowledge, due to the existence of various distinguishing characteristics in the original data, it is often difficult to fully "de-identify" information, even that which has been collated from multiple sources. This problem might be remedied by making a formal distinction between "data" and "information." Section 193.3, *Definitions*, states that "Information means data, reports, source and other information." It is generally accepted in the industry, however, that the input element, "data," is transformed into useful "information" following appropriate analysis. If this distinction were made in Section 193.3 and the wording of the rule modified appropriately throughout, it might then be acceptable to permit the disclosure of "de-identified, summarized *information"* under Section 193.5 . Underlying "data" should not be disclosed under any circumstance.

(c) The disclosure of information under this section "to correct a condition that may compromise safety or security," as explained in the section-by-section analysis, includes using

protected information for enforcement actions that are precipitated by analysis of such data. This type of disclosure and use is much broader than, and contrary to, the authorizing legislation and the FAA's FOQA Policy. That policy states that FAA will "refrain from using de-identified FOQA information to undertake enforcement actions, except in egregious cases, i.e., those that do not meet the conditions listed in section 9, paragraph c of Advisory Circular OO-46D governing the Aviation Safety Action Reporting System." The egregious cases referred to are defined in the AC as violations that are "deliberate; or involve a criminal offense; or disclose a lack of qualification or competency." If it is to be effective, Part 193 must conform to the FOQA policy. If it does not, airlines are not likely to submit much data to the FAA.

Furthermore, as noted above, Section 40123 expressly authorizes the Administrator to designate safety and security information as protected *"notwithstanding any other provision of law."* Thus, it is clear from the plain language of the statute that protected information may not be used by the Administrator to fulfill other responsibilities, including enforcement responsibilities. The statute contemplates that the Administrator's enforcement responsibilities will be carried out independent of – and separate from – this program. Reading the statute otherwise would undermine the intent of Congress and the purpose of the statute.

(cl) The proposed use and disclosure of protected information for criminal prosecutions similarly should be eliminated. Certainly such information should *not* be "used mostly to develop leads and otherwise assist (law enforcement agencies) in the (criminal) investigation" nor should it be used during the prosecution. The final rule should be changed to prohibit such misuses and inappropriate disclosures of voluntarily-submitted data and/or information.

(3) Section 193.9. Designating information as protected under this part: Notice procedure

The designation and withdrawal procedures set forth in § 193.9 are not authorized, unnecessary and cumbersome. ATA recommends that the Administrator determine if voluntarily provided information from certain programs should be designated as "protected," and withdraw such designations, through direct correspondence and review with the applicant using the criteria set forth in the NPRM. As noted above, the statute contemplates that the Administrator will make such determinations in light of the agency's policy goals and based on her particular expertise. The statute does not call for a notice and comment procedure, and public comment will not aid the Administrator in understanding the agency's goals or expand her knowledge or qualifications to make such judgments. When a determination is made to designate information under a specific type of program as protected, such as under a FOQA program or an Aviation Safety Action Program, then it would be appropriate to publish that final determination in the Federal Register.

If the FAA retains the proposed notice and comment procedure, the unintended result of such an arduous, public and bureaucratic process will be to reduce the quantity and quality of safety data that is voluntarily-provided.

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In conclusion, while the intent of the proposed rule is to provide an incentive for air carriers to voluntarily submit safety data through an appropriate expectation that the information will not be disclosed, the NPRM fails to achieve this goal. By leaving the door ajar for numerous exceptions and allowing a virtually unfettered use of the information for enforcement actions and criminal prosecutions, the proposed rule is significantly undermined. The recommendations

presented above will provide both the protection from disclosure and the incentive for reporting that Congress directed.

Respectfully submitted,

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September 24, 1999